

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

GRANT BIRCHMEIER, et al.,	}	Docket No. 12 C 4069
Plaintiffs,		
vs.		
CARIBBEAN CRUISE LINE, INC., et		
al.,		
Defendants.		Chicago, Illinois January 31, 2017 9:45 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS - MOTION  
BEFORE THE HONORABLE MATTHEW F. KENNELLY

APPEARANCES:

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## 1 APPEARANCES CONTINUED:

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Cruise Line, Inc.:

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For The Berkley  
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1 (The following proceedings were had in open court:)

2 THE CLERK: Case No. 12 C 4069, Birchmeier v.  
3 Caribbean Cruise Line.

4 MR. BALABANIAN: Good morning, your Honor. Rafey  
5 Balabanian on behalf of plaintiffs and the class.

6 MR. RAUSCHER: Scott Rauscher also on behalf of  
7 plaintiffs and the class.

8 MR. BACKMAN: Good morning, your Honor. Jeffrey  
9 Backman for Caribbean Cruise Line and Vacation Ownership  
10 Marketing Tours.

11 MR. O'MEARA: Good morning, your Honor. Brian  
12 O'Meara on behalf of the defendant the Berkley Group.

13 UNIDENTIFIED SPEAKER: John (inaudible) on behalf of  
14 the objectors.

15 THE COURT: So I am just going to talk about the -- I  
16 think there was another motion noticed up for today. What I  
17 plan to talk about is the Motion to Extend the Claims  
18 Deadline, the other motion that's entitled Motion to Enforce,  
19 and the one other thing that was noticed up for today I think  
20 was a motion for an order relating to Comcast.

21 MR. BALABANIAN: Yes.

22 THE COURT: That's all I'm going to talk about. Do  
23 you have anything to say about any of those?

24 UNIDENTIFIED SPEAKER: No.

25 THE COURT: Have a seat. You can stay if you want,

1 but you don't need to talk about anything.

2 UNIDENTIFIED SPEAKER: Thanks.

3 THE COURT: I have a couple of threshold questions  
4 and then a couple of threshold comments.

5 MR. BALABANIAN: Yes, your Honor.

6 THE COURT: So as I'm reading the class definition,  
7 there's basically, for want of a better word, two categories  
8 of class members. There are the class members whose phone  
9 numbers are reflected in the records that were obtained from  
10 whichever defendant it was; that's the first class, group.  
11 Then the second group would be other people who, A, claim that  
12 they got calls, and, B, can provide some documentation to  
13 support that. Is that right?

14 MR. BALABANIAN: Correct.

15 THE COURT: And --

16 MR. BACKMAN: Yes, your Honor.

17 THE COURT: All right. And nothing about the claims  
18 process -- am I correct that nothing about the claims process  
19 is intended to eliminate the documentation requirement for  
20 that second group of people? They still have to come up with  
21 documents, right? It's not enough for them just to say, yeah,  
22 I'm in the class, signed under penalties of perjury, give me  
23 my money?

24 MR. BACKMAN: Correct.

25 MR. BALABANIAN: We agree.

1 THE COURT: Everybody agrees with that, okay.

2 And then I wanted to get a handle on one other thing.  
3 So it looks like on the motion to extend claim deadline, it  
4 was somewhere around 320 people. Is it still about 320 people  
5 or is it more than that at this point?

6 MR. BALABANIAN: It's more now. It's about 580.

7 THE COURT: 580. When did it get from 320 -- it was  
8 318 when you filed the motion, which was back on the 5th of  
9 January. So it's gone up another 160 since then?

10 MR. BALABANIAN: Yeah. Scott is telling me that it's  
11 over 600 now. The reason is because the settlement has gotten  
12 a bunch of press over the last couple weeks.

13 THE COURT: What kind of press?

14 MR. BALABANIAN: There's just been news articles  
15 about it.

16 THE COURT: I didn't see any of them. I guess I am  
17 reading the wrong newspapers or the right newspapers.

18 MR. BALABANIAN: I'd say probably the right ones.

19 And so we just got a lot more inquiries from  
20 potential class members asking that we assist them.

21 THE COURT: Okay. And then the total number of claim  
22 forms that had been received, it's 50,000 something?

23 MR. BALABANIAN: 72,000 and change.

24 THE COURT: Okay. Again, that's gone up considerably  
25 in the past couple weeks, it sounds like. The deadline is or

1 was February the 1st?

2 MR. BACKMAN: Tomorrow.

3 MR. BALABANIAN: Tomorrow.

4 THE COURT: All right. So in terms of a percentage,  
5 so we are talking about a little less than 1 percent that are  
6 covered by this, fair statement?

7 MR. BALABANIAN: Yes, sir.

8 MR. BACKMAN: May I just add one thing to that  
9 calculation? So our count is roughly 600 subpoenas, which  
10 include requests for records relating to more like 700  
11 telephone numbers, and so the number of calls that could be  
12 claimed could be substantially more than the number of  
13 subpoenas.

14 THE COURT: Why is there a difference between the  
15 number of subpoenas and the number of numbers? Does this mean  
16 that there's a person that has more than one number?

17 MR. RAUSCHER: It could be a land line, yes.

18 THE COURT: A land line and cell phone or two cell  
19 phones?

20 MR. RAUSCHER: Yes.

21 THE COURT: In other words, you haven't combined  
22 multiple people in a single subpoena. It's multiple phone  
23 numbers for a person or maybe a household.

24 MR. RAUSCHER: It might be both actually in some  
25 instances if it was the same day to the same telephone

1 company.

2 THE COURT: So the increase in numbers, does that  
3 affect the date that you're asking me for on this motion to  
4 extend?

5 MR. BALABANIAN: Not really, because at some level,  
6 we can't just ask you for an open-ended extension, we  
7 understand that. It's just messier that way. So we're  
8 hopeful that the 45 days will be sufficient. Do we think --  
9 it's tough, Judge. It's kind of a catch 22. I'd like to give  
10 the court a date certain, but what I don't want to do, though,  
11 is come back to the court and say I was too ambitious and we  
12 need more time than the 45 days.

13 THE COURT: And I know it sounds like on the last  
14 160, those subpoenas would have gone out by definition within  
15 the last three weeks or so, but the ones before that, have you  
16 gotten compliance on anything at this point? I know there was  
17 that chart. The chart had a fairly small fraction of  
18 compliance numbers.

19 MR. RAUSCHER: That's still the same.

20 THE COURT: Are you in communication with the phone  
21 companies?

22 MR. BALABANIAN: Um-hmm.

23 MR. RAUSCHER: Yes.

24 THE COURT: What are they telling you? It just takes  
25 too long, don't have the records, what are they telling you?

1 MR. BALABANIAN: Super slow. They are just very  
2 slow.

3 THE COURT: Were the subpoenas all issued out of this  
4 court, or were there situations where you had to issue them  
5 out of other districts?

6 MR. RAUSCHER: They all issue out of this court.

7 THE COURT: But other districts --

8 MR. RAUSCHER: They are often served in other  
9 districts. A couple of the carriers are saying -- I think  
10 it's only two are saying we just don't have those kinds of  
11 records, but the rest --

12 THE COURT: The rest aren't telling you that. Are  
13 they telling you they do, but it takes a long time to find  
14 them?

15 MR. RAUSCHER: For the most part, yes.

16 MR. BALABANIAN: For the most part, yes, and they are  
17 quite familiar with us and this case because we kind of went  
18 through this dance at the notice stage, not in the same way,  
19 but certainly it's on their radar.

20 THE COURT: Next, my observation, and then I am going  
21 to kind of turn it over to you to talk about whatever you want  
22 to talk about. My observation, which is largely addressed to  
23 the defendants is this. I assume you have heard the phrase  
24 win the battle and lose the war.

25 MR. O'MEARA: We have.



1           THE COURT: So what's the battle and what's the war  
2 in this case? The battle would be these two motions. The war  
3 is approval of the settlement. And so if what happens is that  
4 I conclude you're right, contract is a contract, four corners,  
5 period, end of discussion, and then I conclude, well, that  
6 contract didn't give people a reasonable opportunity to go and  
7 get their phone records, the war would be approval of the  
8 settlement. And so I'm just telling you right now that that  
9 is an issue that is on the table. And one of the things that  
10 is going to happen before you leave the room today is we're  
11 going to talk about a trial date because I am going to  
12 anticipate the realistic possibility that I will not approve  
13 the settlement if the defendants are able to persuade me the  
14 merit of their position on these two motions, and I am not  
15 going to wait until then to set a trial date. So there you  
16 go.

17           So on the -- a couple of specific questions. I guess  
18 in the -- I am talking about the Motion to Extend the Claims  
19 Deadline first. In the reply brief, the plaintiffs argue that  
20 the date, the claim deadline, the February 1st date, is not a  
21 material term. And if I can kind of boil down the reasons  
22 they argue for that is: Number one, the agreement didn't say  
23 February 1st, it tied it to the date for the final approval  
24 hearing, which I could have set for whenever. If I had set it  
25 for May, then the final approval date would have been a later

1 date than we have now, and so, therefore, it couldn't possibly  
2 have been a material date.

3 And then, secondly, there's this point made that the  
4 settlement agreement contemplates that the final approval is  
5 actually going to happen before all the claims get  
6 adjudicated; in other words, because you have this whole  
7 dispute resolution process. And so those are all arguments  
8 along the lines that the date isn't -- the February 1st date  
9 is not a material term. So I'd like to get your thoughts on  
10 that.

11 MR. BACKMAN: Sure. Well, our position is it wasn't  
12 an agreed-upon deadline, it wasn't a court-ordered deadline,  
13 and the way that the preliminary approval was submitted to  
14 your Honor, it had the date of February 23rd for the final  
15 approval hearing already in it. It wasn't provided to you  
16 with a blank form that said --

17 THE COURT: So if I had said I am not available on  
18 February the 23rd, you would have said, okay, fine, no deal.

19 MR. BACKMAN: No, I am not saying that.

20 THE COURT: That would be a ridiculous argument,  
21 right?

22 MR. BACKMAN: But part of the selection of that date  
23 had us going backwards from the time notice was going out.

24 THE COURT: What if I had told you, as I would have  
25 been telling you if this was last year and it had been June

1 the 23rd, what if I had told you, well, I am having surgery on  
2 that date and I am not going to be available for three months?

3 MR. BACKMAN: I don't know what we would have done.  
4 I don't know what the negotiation back and forth would have  
5 done. That's just the final hearing date, which you're  
6 correct and they're correct that it says 14 days from the  
7 final hearing date. That date would be February 9th, your  
8 Honor. There were different conversations that took place,  
9 and if you want to hear about them, Mr. O'Meara had them with  
10 Ms. Rapp. There were conversations specifically about what  
11 the claims deadline was going to be, and as you will see, it's  
12 not February 9th, it's February 1st. We actually wanted  
13 January 24th, they wanted February 9th, we met in the middle.  
14 It was an agreed-upon deadline.

15 THE COURT: Fill me in on the conversations.

16 MR. O'MEARA: Sure, Judge. Ms. Rapp and I did talk  
17 about the date. As you recall, the original date for the  
18 final fairness hearing was in January. Because I think they  
19 needed some more time to get the notice out, Ms. Rapp asked me  
20 to basically kick everything back two weeks. I said that's  
21 not a problem because we are basing it off of when notice was  
22 supposed to go out and the time frame between that --

23 THE COURT: What was the notice-supposed-to-go-out  
24 date?

25 MR. O'MEARA: It was, I think, early -- like October,

1 October-ish.

2 THE COURT: The final approval is mid September-ish,  
3 thereabouts? The preliminary approval, rather, it was mid  
4 September.

5 MR. O'MEARA: Correct.

6 THE COURT: Like the 19th or something like that?

7 MR. O'MEARA: Yeah, we settled early September. So  
8 those dates were in line, and Ms. Rapp asked for an additional  
9 two weeks to kick everything out, including the final approval  
10 hearing which had been set for, I believe, the 23rd of  
11 January. She had a proposed schedule. I looked at it, I  
12 said, okay, it looks like everything is getting kicked out two  
13 weeks except for the final approval hearing which was kicked  
14 out about a month, exactly a month I think, February 23rd.

15 I then looked back because the notice documents then  
16 said a February 9th claims deadline. I then talked to Ms.  
17 Rapp and said, you know, Eve, I thought everything was going  
18 to get kicked out just two weeks. The earlier claims deadline  
19 was January 10th, and so I assumed -- I said you can't have  
20 that January 24th because that would be two weeks,  
21 inconsistent with all the other dates. We talked about it,  
22 negotiated it, and we landed on February 1st as the claims  
23 deadline, and that's what the claims deadline is right now.

24 THE COURT: So this is a discussion that was  
25 happening when in relation to the preliminary approval, before

1 or after, during?

2 MR. O'MEARA: It was after. I will tell you it was  
3 -- I was watching the Cubs game when we talked on the phone.

4 THE COURT: That could be April 1st. Which Cubs?  
5 Are we talking about a playoff game?

6 MR. O'MEARA: When they were getting down to the  
7 playoffs.

8 THE COURT: I am a Sox fan, you know.

9 MR. O'MEARA: I know.

10 THE COURT: As, I think, is your mediator.

11 MR. O'MEARA: Yes, I know. I am very careful.

12 THE COURT: He probably said that a few times during  
13 your mediation session.

14 MR. O'MEARA: Yes.

15 THE COURT: But I don't hate the Cubs. I just want  
16 to make that clear on the record.

17 MR. BALABANIAN: How offensive is it that the 2005  
18 win got no coverage like that? Come on.

19 THE COURT: I'm telling you.

20 MR. BALABANIAN: They hadn't won in a long time.

21 THE COURT: So when did the notice then actually go  
22 out?

23 MR. O'MEARA: That ended up -- I don't want to speak  
24 for them, but I believe mid November was when the website went  
25 live and then there was a direct notice that went out

1 thereafter, so we were framing it as when is notice going to  
2 go out and how much time --

3 THE COURT: So originally it was contemplated that it  
4 was going to go out in early October, but these discussions  
5 that you had with Ms. Rapp that you talked about, was that at  
6 a period of time when it was apparent that it wasn't going to  
7 happen in early October?

8 MR. O'MEARA: Yes. She reached out to me and said,  
9 can we talk about timing here, and I said, sure, and that's  
10 when we talked, and I think that was the whole reason that  
11 they had to get notice out, or whatever was going on, and they  
12 said we just need to kick everything two weeks. I agreed  
13 except for the approval date.

14 THE COURT: Does mid November sound about right?

15 MR. BALABANIAN: It does sound right.

16 THE COURT: Okay. Had you finished your point,  
17 Mr. Backman?

18 MR. BACKMAN: I did on that particular issue, yes.  
19 Thank you.

20 THE COURT: Do you want to respond?

21 MR. BALABANIAN: I think everything they said is  
22 obviously true. I have no reason to disbelieve anything they  
23 said.

24 I will say that, you know, that was in the context of  
25 setting a final approval schedule, and I don't -- I think it's

1 probably a little bit too far to say that that was a hotly  
2 disputed and negotiated point as far as the claims deadline.  
3 The notice date got kicked out because at the end of the day,  
4 KCC wasn't able to get the notice out based on the schedule  
5 that the Court had thought we were going to get the notice out  
6 at preliminary approval.

7           Once that happened, we kind of just had to scramble  
8 to kick things out, and I am not honestly sure why we picked  
9 the 23rd of February for the final fairness hearing as opposed  
10 to some other date, but I will say that --

11           THE COURT: That day, Mr. Backman, you were saying  
12 was in the draft order, or at least was in the settlement  
13 agreement that was presented to me at the time of the  
14 preliminary approval?

15           MR. BACKMAN: It was in the draft order, right, the  
16 parties agreed on that date.

17           THE COURT: So that had been negotiated as part of --  
18 whether it was with Judge Andersen or after Judge Andersen,  
19 that was all part of the discussion you had before the  
20 preliminary approval motion was presented. Does that sound  
21 right?

22           MR. BACKMAN: Not the February 23rd date because that  
23 was the amended preliminary approval date.

24           THE COURT: Oh, okay. See, I was misunderstanding.

25           MR. BACKMAN: So with respect to all this timing --

1 THE COURT: So the amended preliminary approval order  
2 is the one I entered on October the 26th?

3 MR. BALABANIAN: I think that's right, Judge.

4 THE COURT: I am looking at the docket.

5 MR. BALABANIAN: That's got to be the date.

6 THE COURT: The preliminary approval order, which was  
7 entered -- actually, I was wrong about the date. It was  
8 October -- I granted the motion on September 29th, the order  
9 was entered on October the 5th. And I'm just going to pull it  
10 up here to see what the date for the --

11 MR. BACKMAN: It was January 24th, your Honor.

12 THE COURT: January 24th was the date for the  
13 deadline at that point or the hearing?

14 MR. BACKMAN: No, it would have been 14 days prior to  
15 January 24.

16 THE COURT: So January 24th was the date I had it for  
17 the fairness hearing.

18 MR. BACKMAN: Correct.

19 MR. O'MEARA: I misspoke.

20 THE COURT: That's okay. So the 24th of January, and  
21 then when I entered the amended preliminary approval order,  
22 which was October 26th, that's when it got moved to February.

23 MR. BACKMAN: Correct.

24 MR. BALABANIAN: Yes.

25 THE COURT: And then notice goes out sometime the end



1 of November.

2 MR. BALABANIAN: And I guess --

3 THE COURT: I am just going to tell you, I mean, what  
4 I would have done at the time. I mean, I have to think more  
5 about it -- but so one of the points that the defendants make  
6 in their submission on this motion is that this whole idea  
7 that people might have to get phone records, that was  
8 something that could be reasonably anticipated. I don't  
9 disagree with you on that. If I had -- I want to choose my  
10 word carefully here -- if I had understood when I entered the  
11 amended preliminary approval order that effectively what that  
12 was going to mean -- because notice doesn't go out a  
13 nanosecond after the approval order is entered, it goes out  
14 three weeks after that, it's a reasonable period of time --  
15 but effectively what that was going to mean was that people  
16 were going to have two months after getting the notice to  
17 obtain phone records from how many years ago -- 2011?

18 MR. RAUSCHER: 2011 to 2012.

19 THE COURT: Five and a half years ago.

20 THE COURT: Right. -- (continuing) I might have said  
21 that's not enough time because -- I mean, we had plenty of  
22 experience with phone records in this case, I have had plenty  
23 of it in other cases, I had plenty of it back in the days  
24 before I was practicing law, but that was mostly land line  
25 stuff, but phone companies get a lot of requests for records,

1 they get tons of them. They tend to -- my experience --  
2 because I did both civil and criminal law when I was  
3 practicing -- my experience is they always prioritize the  
4 criminal stuff because they pretty much have to. Most of it  
5 is coming from the government or the state or whoever. The  
6 civil stuff gets put behind, and I'm really sort of  
7 questioning whether, you know, that all should have been  
8 flagged at that point. I am not faulting anybody. Maybe I  
9 should have caught it on my own. I really just kind of  
10 question whether that was a reasonable amount of time, because  
11 it's not a lot of time to get phone records from the phone  
12 company.

13 Do you want to say something?

14 MR. BALABANIAN: I agree with you. I would just say  
15 that it is really hard to anticipate from carrier to  
16 carrier --

17 THE COURT: Yeah.

18 MR. BALABANIAN: -- which one is going to be more --

19 THE COURT: You got big ones and you have small ones,  
20 and some I never even heard of before.

21 MR. BALABANIAN: And some of the bigger ones, like  
22 AT&T is pretty responsive.

23 THE COURT: Honestly, always been my experience.

24 MR. BALABANIAN: Yeah, and some, you know, T-Mobile  
25 doesn't like subpoenas.

1           THE COURT: And I had -- I had an antitrust MDL where  
2 we had the same kind of issues because it was about text  
3 messaging, so it was all about phone companies, and I had to  
4 deal with -- T-Mobile was one of them.

5           MR. BALABANIAN: It was just -- it's one of those  
6 things where, sure, would we have wanted more time, yes. At  
7 some point, though, were we a little weary of asking the Court  
8 for a six-month approval schedule or a five-month approval  
9 schedule.

10          THE COURT: Yeah, I don't think it's likely that I  
11 would have given you that. But, you know, the odds are pretty  
12 strong that I would have said, you know, two months is  
13 probably kind of pushing it, even without knowing the number  
14 of requests that come in. And I say that not because the  
15 number of, you know, subpoenas or potential claimants that you  
16 have had to send out subpoenas for is big in relationship to  
17 the overall class or the overall numbers of claims, it's not.  
18 It's one percent or a little less than one percent, but it's a  
19 lot of subpoenas to send out. Those don't all happen at the  
20 snap of a finger either.

21          I will say -- one of the issues that I -- one of the  
22 things that the defendants argue in the response on this  
23 motion is well, okay, if you are going to extend it, then it  
24 shouldn't increase the amount of money we have to pay, it  
25 should -- there should be some sort of pro rata reduction of

1 everybody's claims based on this. I regard that as  
2 extraordinarily problematic. It sets up a conflict within the  
3 class. You're pitting these 580 people against the rest of  
4 them, and maybe because it's only 1 percent, it's not a huge  
5 reduction, but it's a reduction. It just -- you're setting up  
6 a conflict for class counsel. I don't regard that as a  
7 realistic alternative. It's not contemplated in the notice.  
8 I think arguably there would be an argument to be made that  
9 there would have to be some further notification of that.

10 Okay. I may have one more question on that, but I am  
11 going to hold it. I want to move on to the other questions,  
12 unless anybody has anything else to say to me.

13 MR. BACKMAN: I do. I have one thing just in the  
14 context of the motion to extend. Maybe it puts it in a  
15 different perspective.

16 Our numbers that we have run preliminarily show that  
17 of the some 700 telephone numbers at issue in these subpoenas,  
18 roughly 425 of them are in class telephone numbers.

19 THE COURT: In class --

20 MR. BACKMAN: They are all on the class list. In  
21 other words, they don't need the records.

22 THE COURT: They don't need the records?

23 MR. BACKMAN: They don't need the records. To file  
24 their claims, they don't need the records. Of the subpoenas,  
25 roughly 300 have already filed claims. And so our point is

1 this is a motion to extend the claims deadline. It's not a  
2 motion to approve some late-filed claims based on unique  
3 circumstances. I don't -- I don't see why the individuals who  
4 have contacted them can't file their claims. File your claim  
5 form.

6 THE COURT: But they don't have the other part -- at  
7 least for the people who are out of the list, off-list people,  
8 they don't have the second thing that everybody agreed a few  
9 minutes ago that they needed, which is records.

10 MR. BACKMAN: I don't know what those individuals  
11 should do as I stand here now, whether they should file some  
12 sort of supplemental declaration with their claim form,  
13 whether there is some alternative they can do short --

14 THE COURT: Honestly, when I ask questions at the  
15 beginning, I actually ask them for a reason. I ask them at  
16 the beginning for a reason. Everybody said, oh, no,  
17 documentation is required, it's not enough to simply -- I  
18 asked this question exactly this way because of this.

19 MR. BACKMAN: And I agree with you.

20 THE COURT: This is why I asked the question, and you  
21 said that wasn't going to be good enough. What you're telling  
22 me now is go ahead and let them file the claim form, ha, then  
23 we are going to object to them, and they are going to be  
24 insufficient.

25 MR. BACKMAN: We might object to them regardless,

1 whether they get the telephone records or not. My point about  
2 the documentation is yes, they needed documentation, but what  
3 that documentation is is not defined. It says in their own  
4 documents, it could be telephone records, it could be a bill,  
5 it could be a Caller ID record, it could be something else  
6 showing --

7 THE COURT: Who keeps phone bills from five years  
8 ago?

9 MR. BACKMAN: I don't know. I wasn't negotiating  
10 this agreement from the plaintiffs' perspective. I was  
11 negotiating --

12 THE COURT: Your argument is cross-purposes to  
13 yourself at this point. You know --

14 MR. BALABANIAN: I am not sure they want that to be  
15 the case in terms of the portion of the class that is supposed  
16 to adduce, I would think, records based on what we have all  
17 talked about. Maybe they have a recording of the phone call,  
18 but I think that's going to be a really small number.

19 THE COURT: I already have one objection from a pro  
20 se objector. It's on the docket. It was filed in the end of  
21 November saying, I object to this because you have limited  
22 this -- you have already limited the class too much for this  
23 filing of this requirement of documents. I am going to quote  
24 what he says:

25 I am shocked that I am required to file supporting

1 documentation to have myself included in this class action.  
2 Keeping paperwork or screen shots of phone calls that were  
3 received five-plus years ago would classify me as a hoarder  
4 and could fill my house ten times over if I had to do this  
5 with all the paperwork I go through. You can't possibly  
6 expect me to be able to reproduce these records, end of quote.

7           Now, it's a little bit of an exaggeration. You  
8 wouldn't have to be a hoarder. You would have to be kind of a  
9 mini hoarder, or at least you'd have to be somewhere towards  
10 the middle of the obsessive-compulsive scale, let's just put  
11 it that way, but he has a valid point. And so, you know, this  
12 is one -- even though this guy didn't have a lawyer, it's an  
13 objection, I have to consider this objection, and I have to  
14 consider -- if I can quote, you know, Justice Douglas from  
15 1965, I have to consider the penumbra of his objection, and  
16 the penumbra of his objection is you've done this in a craft  
17 way that precludes people who could legitimately find  
18 themselves in this class from having the opportunity to do  
19 that. That's why I said the other thing that I said at the  
20 outset. You win the battle and lose the war.

21           I mean, I think people could -- particularly if it's  
22 right, as you just said, that 300-and-some odd of these people  
23 are on the list already, and I guess I'd encourage you to tell  
24 -- to give that list to Mr. Rauscher or Mr. Balabanian. So  
25 really what we're talking about is 260 people. I mean, I can

1    imagine somebody making a rational business decision that,  
2    okay, we can live with giving those people -- and I am not  
3    talking about extending the claims deadline for everybody; I  
4    don't think anybody is. We are talking about extending the  
5    date for these people to perfect their claim. I could justify  
6    a reasonable business decision that I am just going to live  
7    with potentially some proportion of those 260 people, it  
8    probably won't be all of them because all of them won't be  
9    able to even come up with the records, as opposed to here  
10   comes the monkey wrench flinging across the room falling into  
11   the settlement over there. Just a thought.

12            We are going to move on to the other motion. The  
13   other motion is called Motion to Enforce, and it looks like --  
14   so this is the one that I will call -- with one exception what  
15   I will call form completion deficiencies.

16            Okay. The one exception would be not on the list and  
17   didn't submit any supporting evidence. That's not a form  
18   completion deficiency. Now, some of these people might have  
19   been people you subpoenaed records for. If they are not, you  
20   know, those people -- I mean, that's not a form completion.  
21   They are not class members.

22            MR. BALABANIAN: Right.

23            THE COURT: They are not class members as the term  
24   has been defined. The rest of them are all form completion  
25   errors. I guess again I will just make an observation. I



1 will not quote Justice Douglas. I will quote Mr. Rogers.  
2 People make mistakes. And any time you have 50,000 people  
3 fill out a form, you're going to have some percentage of them  
4 that are going to make mistakes. I know this -- I will give  
5 you an example. It's not a perfect example, but it's an  
6 example. When I pick juries -- you got pretty close to this  
7 process -- there is a questionnaire that people fill out.  
8 It's routine for people to make mistakes. It's routine for  
9 people to leave things blank and not realize they left them  
10 blank, and we end up having to ask them about it here. It's  
11 routine for people to put down the wrong bit of information,  
12 and then they correct it when you actually ask them a  
13 question, and we all know this from life.

14 I know it from reading briefs that are filed by  
15 lawyers, typos, you know, that don't get caught one way or  
16 another. Mistakes get made. And I understand the point that  
17 people -- you know, you are a member of a class, you are  
18 submitting it under the penalties of perjury, you're supposed  
19 to be careful, I get all that, but there's going to be some  
20 percentage of mistakes. Again, win the battle, lose the war  
21 is an issue here.

22 So the rest of them are things like -- so the one  
23 thing that's agreed to is that everybody has agreed, it seems  
24 like, that if somebody put the phone number on the wrong  
25 line -- and that's apparently something like 832 calls --

1 MR. RAUSCHER: We are up a little bit 9.

2 THE COURT: It's around 900. -- (continuing) that  
3 both sides agree that those were okay.

4 MR. BALABANIAN: Yes.

5 MR. BACKMAN: Yes.

6 THE COURT: Right?

7 MR. O'MEARA: Yes.

8 THE COURT: It looks like on the other side where the  
9 people chose both options one and two, everybody's now agreed  
10 that if they didn't list the number of calls, it's option one,  
11 which is the lower dollar amount; if it did list the number of  
12 calls, then you can assume it's option two, that's the higher  
13 dollar amount. That leaves everything else: no signature, no  
14 identification number, no phone number was listed, it shows  
15 option two but didn't list the number of calls, didn't check  
16 either option -- or didn't check off either option, I guess  
17 that covers it.

18 So do you have a sense of how many people -- on the  
19 stuff that didn't get agreed to, how many people we have left  
20 there, ballpark?

21 MR. RAUSCHER: I think --

22 MR. O'MEARA: I have a list.

23 MR. RAUSCHER: I think we are somewhere around -- I  
24 should have added this up before.

25 MR. BACKMAN: I think it's about 15,000 or so.

1 THE COURT: That's a big percentage of the class. So  
2 that's how many?

3 MR. BALABANIAN: 72,000.

4 THE COURT: So 15,000 -- it's over 20 percent.

5 Let me ask you this question. So in the -- in terms  
6 of the process, let's say that there had never been -- let's  
7 say that no motions had gotten filed and these were all done  
8 in the ordinary course, what the defendants contend should  
9 have happened is the claims administrator should have said  
10 denied, right, because you didn't fill out the form the right  
11 way, denied. Those people would all be told your claim has  
12 been denied. You have the ability to appeal, right? Still  
13 right?

14 MR. BACKMAN: No, your Honor. If the claim is  
15 rejected by the class administrator, that's it.

16 THE COURT: What's the appeal involve?

17 MR. BACKMAN: The challenge process is a challenge  
18 process negotiated for the defendants to challenge any  
19 approved claim.

20 MR. BALABANIAN: That's not exactly --

21 MR. BACKMAN: I'm sorry, and the plaintiffs have that  
22 right too.

23 MR. BALABANIAN: It really deals with the number of  
24 calls claimed.

25 MR. BACKMAN: Correct.

1 MR. BALABANIAN: That's what the challenge process  
2 deals with, not a deficient claim that's denied. The  
3 settlement doesn't contemplate down the road six months from  
4 now all those people getting notice. That would be incredibly  
5 costly.

6 THE COURT: I might not have understood that. That  
7 would be on me.

8 So give me a reason why a claim would be approved and  
9 then somebody would appeal it. I mean, give me an example of  
10 one.

11 MR. BACKMAN: From our perspective, we would be  
12 challenging the number of calls.

13 THE COURT: Got it.

14 MR. BACKMAN: An easy example is somebody who selects  
15 option 2.

16 THE COURT: They are on the list and the list says  
17 they got one and they say they got three.

18 MR. BACKMAN: Correct, or like some of these folks  
19 have said 9,999 calls. We are going to challenge those.

20 THE COURT: You got one of those?

21 MR. BACKMAN: Yes.

22 MR. BALABANIAN: And we are probably going to  
23 challenge that too. We haven't seen that claim yet.

24 THE COURT: Someone really said 9,999?

25 MR. BALABANIAN: I am not going to take a position

1 against one of my clients, but we would likely challenge that  
2 claim as well.

3 THE COURT: You can imagine a wall of the kitchen  
4 with the slash marks on it, 1, 2, 3, 4, slash, 1, 2, 3, 4,  
5 slash, sort of like somebody counting off the days they were  
6 in prison.

7 Okay. That's interesting.

8 Okay. So that's what that was.

9 All right. So, basically, for these 15,000 people,  
10 if the defendants are right, what will happen is that they're  
11 told denied, and then that's essentially the end of it.

12 MR. BALABANIAN: Right.

13 THE COURT: And when will they be told that they are  
14 denied?

15 MR. BALABANIAN: They are not going to be told they  
16 are denied. They're just not going to ever be paid on account  
17 of the settlement.

18 THE COURT: Is that right?

19 MR. BACKMAN: That's my understanding, yes.

20 THE COURT: Okay. So let me just -- this issue had  
21 not occurred to me until about a minute and a half ago, but it  
22 occurred to me a minute and a half ago, so I am going to raise  
23 it now, particularly given the number of people. It's  
24 reasonable to think that I'm going to hear from some of those  
25 people after the fact, and the reason I can say this is,

1 again, experience. I had another case -- how big was the  
2 potential class in this case?

3 MR. BALABANIAN: This class?

4 THE COURT: As defined.

5 MR. BALABANIAN: About a million on the list.

6 THE COURT: So I had another case actually with  
7 Mr. Kanovitz from Mr. Rauscher's firm that involved strip  
8 searches upon intake at the Cook County Jail. The class was  
9 potentially as big as 500,000 people, and most of these people  
10 were in custody. So we had this whole elaborate process of  
11 sending out notice. I still get today -- this was a  
12 settlement paid out three, four years ago; just a ballpark --  
13 I still get today something from people that My claim got  
14 wrongfully denied, or, I never got notice, I just heard about  
15 this from my cellmate or whatever. I am going to hear from  
16 some of these people because the amount of money that people  
17 are getting -- potentially getting in this case is actually a  
18 little bit more than those people at least at the low end were  
19 getting in that case.

20 So what are the implications of -- so if somebody  
21 comes back to me kind of with a version of this gentleman,  
22 this Dr. Taylor, Dr. Taylor's objection saying, My claim got  
23 denied, I filled out the form, oh, I looked at it, and, you  
24 know, I put something on line A when it should have been on  
25 line B, this isn't fair. So all of those people potentially

1 would have a legitimate objection to the claim processing and  
2 approval process, and yet it will be too late for them to  
3 raise it because the settlement will have already been  
4 approved or denied -- not approved, I guess. Let's say it's  
5 approved, is that a problem?

6 MR. BALABANIAN: Yeah, I think that those people -- I  
7 didn't mean to jump in, but I think those people --

8 THE COURT: I asked a question. You are not jumping  
9 in.

10 MR. BALABANIAN: Their objection would be essentially  
11 that we didn't follow the settlement agreement. If you accept  
12 our reading of it and those people filed deficient claims, we  
13 think the settlement agreement clearly provides it, and we  
14 don't think it's a remarkable point, that those people should  
15 be given notice of the deficiency and an opportunity to cure  
16 it. And if that doesn't happen, I think their objection would  
17 be you didn't comply with the actual language of the  
18 settlement agreement. And I think they would probably have  
19 somewhat of a valid objection there.

20 What the dispute at this point boils down to is  
21 should we tell these people right now that their claim is  
22 going to get denied if they don't do anything, and I think the  
23 agreement clearly provides for that.

24 THE COURT: Mr. Backman.

25 MR. BACKMAN: I think you have to default to the

1 agreement itself. The agreement doesn't contemplate noticing  
2 an opportunity to cure. The screening for fraud and abuse  
3 provision that they cite to isn't a notice and opportunity to  
4 cure provision. So the agreement that the parties entered  
5 into is what needs to be followed by the class administrator.

6 THE COURT: Can you point me to where -- I am not  
7 saying it's not there. I just want to see where it is.

8 I got the -- I've got the -- I think I have the  
9 settlement agreement here.

10 MR. BALABANIAN: I have a copy, if the Court needs  
11 it.

12 THE COURT: No, I think I've got it. I've got it  
13 here. Can you point to me the provision in the settlement  
14 agreement or better yet, maybe both places, first the  
15 settlement agreement and the notice to the class members that  
16 talks about the way in which the forms have to be filled out,  
17 how they get denied, and that kind of thing.

18 MR. BALABANIAN: Yes. One moment, your Honor.

19 THE COURT: Yeah, it's a long agreement. I wouldn't  
20 expect you to kind of know that kind of off the top of your  
21 head.

22 MR. BALABANIAN: So to the agreement, turning to the  
23 agreement, I would say the first thing you would look at is  
24 the definition of approved claim.

25 THE COURT: Which is which page?



1 MR. BALABANIAN: Page 5.

2 THE COURT: All right. I am there.

3 MR. BALABANIAN: It's 1.2.

4 THE COURT: Let me just read it to myself. Approved  
5 claims means a claim form dot, dot, dot that is submitted  
6 timely and in accordance with the directives of the claim form  
7 and the provisions of the settlement agreement, fully and  
8 truthfully completed and executed with all the information  
9 requested in the claim form, signed by the settlement class  
10 physically, electronically, et cetera, and verified by the  
11 settlement administrator. Okay.

12 So then my second question is the notice. The notice  
13 is attached to this thing?

14 MR. BALABANIAN: It is, your Honor.

15 THE COURT: Is the claim form part of the notice?

16 MR. BALABANIAN: It was for the -- yes, it is.

17 THE COURT: So what I'm looking for is on the thing  
18 -- I mean, honestly, I don't think anybody -- at least nobody  
19 in their right mind would rationally expect anybody to read  
20 the settlement agreement in its entirety. Where on what the  
21 people actually saw in their notice, other than potentially  
22 the argument that it's obvious that when you're filling out a  
23 form and have to sign it under penalties of perjury that it  
24 needs to be accurate, but where is it in there that tells  
25 people what Mr. Balabanian just cited to in the settlement

1 agreement?

2 MR. BACKMAN: Your Honor, you are looking at docket  
3 entry 502?

4 THE COURT: I am looking at 497, but I think it's the  
5 same as 502.

6 MR. BACKMAN: Yes.

7 THE COURT: I can pull up 502.

8 MR. RAUSCHER: Your Honor, I have a claim form in  
9 hard copy, if it would help.

10 THE COURT: That would help, thanks.

11 MR. RAUSCHER: This would be people on the class list  
12 because they are not being asked to provide --

13 MR. BACKMAN: I have the other ones too.

14 THE COURT: Let me see the other one too.

15 MR. RAUSCHER: I should double-check. I might have  
16 given you the non-class list. That one actually may require  
17 proof.

18 MR. BACKMAN: It may have some pen mark on there. I  
19 apologize.

20 THE COURT: Don't worry about it.

21 MR. BACKMAN: I could direct you to the long form  
22 notice as well in the document.

23 THE COURT: Where in the long form?

24 MR. BACKMAN: If you're at docket entry 502.

25 THE COURT: What paragraph?

1 MR. BACKMAN: It would be page -- it would start at  
2 page 59 of 73.

3 MR. BALABANIAN: Of the ECF.

4 MR. BACKMAN: Of the ECF.

5 THE COURT: What's the document?

6 MR. BACKMAN: I could bring up the copy.

7 THE COURT: That would be easier.

8 MR. BACKMAN: Again, it's got some handwriting.

9 THE COURT: Don't worry about that.

10 MR. BACKMAN: Sure.

11 THE COURT: Okay. Yeah, this is the same thing I had  
12 up on my screen. So what part of this?

13 Okay. What part of the notice should I be looking at  
14 here?

15 MR. BACKMAN: I would think page 3 of that document.  
16 It starts --

17 THE COURT: And now that I have it on my screen, you  
18 can have this back because it will help you to kind of refer  
19 me to the right spot.

20 MR. BACKMAN: I think paragraphs 6, 7, and 8.

21 THE COURT: Let me just read those.

22 If I can use the kind of breakdown that was used in  
23 the motion by the plaintiffs, you have A through H, I think.  
24 When C was -- didn't identify the number of calls, does that  
25 mean the person didn't check off either option 1 or option 2?

1 MR. BALABANIAN: I think so, yes.

2 THE COURT: Or did it mean something different than  
3 that? That was actually another category. F was didn't  
4 choose either option 1 or option 2.

5 MR. RAUSCHER: I think that would more likely be they  
6 didn't put option 2.

7 THE COURT: Or didn't fill in the blank.

8 MR. RAUSCHER: Or filled in the blank but put  
9 something like I got a bunch of calls or more than X number of  
10 calls, something like that.

11 THE COURT: Does that sound right to you?

12 MR. BACKMAN: Yeah, or several was the example.

13 MR. RAUSCHER: Several.

14 MR. BACKMAN: The class administrator --

15 THE COURT: And the breakdown is three calls or  
16 fewer. If a person submits a proper claim form and checked  
17 off option 1, three calls or fewer, they get X, whatever X  
18 turns out to be. If they submit a proper claim form with the  
19 required proof and check option 2, more than three calls and  
20 give a number, then remind me what happens. Is it a multiple  
21 of X or is it X plus something or what?

22 MR. BACKMAN: It's per call after three, it's 500 per  
23 call after three depending on how high.

24 MR. RAUSCHER: It's per call no matter how many you  
25 pick.

1 THE COURT: So we have some people, for example, that  
2 chose option 2 which says, Option 2, more than three calls,  
3 but they didn't fill in the blank.

4 MR. RAUSCHER: Yes.

5 MR. BALABANIAN: Yes.

6 THE COURT: And the defendants' position is that  
7 those people didn't submit a compliant claim form and they  
8 should be denied even if they submitted documentation.

9 MR. BACKMAN: Correct.

10 THE COURT: Wow. In all -- I know that the claim  
11 form isn't a contract as such, but you're talking about  
12 compliance with a contract, and there's something -- it's been  
13 a long time since I took first year of contracts, I am not  
14 going to tell you how long ago it was, it was a long time  
15 ago -- substantial performance. I mean, why wouldn't you  
16 treat somebody who checked off more than three but didn't give  
17 a number, fine, then you are going to default back to option  
18 1?

19 MR. BACKMAN: Can I just --

20 THE COURT: And the reason I'm asking this now is it  
21 sounds like what's happening is I am never going to get to  
22 decide that. It's going to all be decided by the  
23 administrator, and I am never even going to see it.

24 MR. BACKMAN: Can I say it a little differently? Our  
25 perspective is from the defense side, that if there's

1 information in the claim form which allows the class  
2 administrator to determine that a claim is eligible to be  
3 approved, that the class administrator should do what it can  
4 to make that determination. We can fight about the number of  
5 calls later. If there is not enough information in the claim  
6 form for the class administrator to determine eligibility,  
7 then it should be rejected.

8 THE COURT: Maybe I'm asking the question to the  
9 wrong people. Are the class counsel telling me that if  
10 somebody checked off option 2 but didn't fill in the blank and  
11 did everything else that they're supposed to do, that what's  
12 going to happen is that the claims administrator is going to  
13 say denied?

14 So there's three possible answers to that question.  
15 One possible answer is yes, one possible answer is no, and one  
16 possible answer is I don't know.

17 MR. BALABANIAN: Yes, as things stand correctly.

18 THE COURT: Why would they do that?

19 MR. BALABANIAN: Because they have to have an  
20 agreement between the parties to send out this notice of  
21 deficiency, and other than that, they can either -- they can  
22 only accept or reject claims.

23 THE COURT: I guess what I am asking is a different  
24 question. What you're telling me is that if somebody checks  
25 off on this long claim form here option 2, more than three

1 calls, I affirm that I received blank number of calls, they  
2 left it blank, they attached documentation of some sort, the  
3 claims administrator is going to say -- by the way, I am  
4 holding it up like this, that's on purpose, that's meant as a  
5 reference. Do you remember that picture from the 2011  
6 election?

7 MR. BACKMAN: Judge Rosenberg.

8 THE COURT: The guy holding up the form and looking  
9 to see if the --

10 MR. BACKMAN: With the magnifying glass too.

11 THE COURT: I kid. The claims administrator is going  
12 to say you lose?

13 MR. BALABANIAN: We would tell the claims  
14 administrator that it should default to three.

15 THE COURT: Who does the claims administrator answer  
16 to, you or me or nobody?

17 MR. BALABANIAN: Both parties and the Court,  
18 ultimately.

19 THE COURT: No, I'm not going to find out about this.  
20 They don't answer to me. You guys just told me this is all  
21 under the radar before I get it. The only possibility of any  
22 challenges to denials are going to be these challenges over  
23 the number of claims, not over yes or no. It's going to be  
24 over the number of claims.

25 MR. BACKMAN: The way I've seen this come up in the

1 past -- I am not sure if Rafey and Scott have a different  
2 experience -- but the way I've seen this come up is not --  
3 well, it would be a settlement agreement that has a specific  
4 notice and opportunity to cure provision. If that exists, the  
5 settlement administrator would do what the settlement  
6 agreement says.

7           As it relates to this deficient/rejected/approved,  
8 the way I see it come up is after the determination is made in  
9 connection with the final approval of all the claims, the  
10 parties would come back and challenge the administrator's  
11 designations or reject it. That's how this would come. This  
12 group of claims should not have been deemed rejected, and then  
13 your Honor would make that decision.

14           What we are here on, they are asking for an  
15 opportunity to cure for every one of these buckets.

16           THE COURT: So here's where we are at this point,  
17 unless anybody has anything else you want to say. Does  
18 anybody have anything else you want to say on these? I am not  
19 going to rule on these right now. I am just going to talk to  
20 you.

21           So, look, I'm happy to make a ruling on this stuff.  
22 I will do that, but I would like -- I am going to strongly  
23 suggest that everybody go back and spend like a day and a  
24 half, that would be the rest of today and tomorrow, to see if  
25 you can -- if there is a way that you can come up with some



1 accommodation on some or all of this stuff. I am not saying  
2 you have to, I am not saying you don't have to. And then you  
3 come back on Thursday, you'll tell me, and then I'll rule on  
4 whatever is left, whether it's everything that's left or  
5 whether it's some part of it. That's what I am going to  
6 suggest.

7           There has to be a prompt ruling on this. I know that  
8 Thursday is the day after the deadline, but I'm out of here.  
9 I am not in here tomorrow morning. I am not in here --  
10 frankly, I mean, I could theoretically have you come back  
11 tomorrow afternoon, but it kind of depends how long something  
12 goes. I could theoretically have you come back tomorrow  
13 afternoon if that would be better, like 2:00 or something like  
14 that.

15           MR. BACKMAN: I'm assuming you might want to hear  
16 from counsel again, so tomorrow afternoon would be better for  
17 me.

18           THE COURT: Then you don't have to stick around for  
19 two extra days. Does that give you enough time to talk?

20           MR. BACKMAN: Yeah, we could certainly all get  
21 together.

22           THE COURT: You may have to talk to other people --

23           MR. BACKMAN: Get on the phone with our clients, but  
24 I think we should be okay.

25           THE COURT: Hang on one second.

1 THE COURT: 2:00 o'clock tomorrow. The motions are  
2 entered and continued to 2:00 o'clock tomorrow.

3 MR. BALABANIAN: Thank you, your Honor.

4 THE COURT: You don't have to file anything. Just  
5 come in at 2:00. You are going to tell me here is where we  
6 are. We haven't agreed to anything, which is fine. We have  
7 agreed to this, this, and this and not this, which is fine.  
8 We have agreed to everything, which is fine.

9 MR. BACKMAN: Thank you, your Honor.

10 THE COURT: Then I will just rule on whatever is  
11 left.

12 MR. BALABANIAN: Final motion we will deal with  
13 tomorrow. It's agreed essentially.

14 THE COURT: But my impression on that, though, is  
15 that -- I mean, it's a moot point. The subpoena to Comcast,  
16 it's a moot point unless I grant one of these motions, right?

17 MR. RAUSCHER: I think not necessarily, because it  
18 could be relevant in the challenge process. It might be too  
19 late to start serving subpoenas --

20 THE COURT: Fair enough. Was that motion unopposed?

21 MR. BACKMAN: We don't oppose it.

22 THE COURT: You don't oppose it. Let me just pull it  
23 up here.

24 Pam, this is docket No. 553. It's a motion for an  
25 order compelling Comcast to produce records. It's granted.

1 Have you given me the draft order on that yet?

2 MR. RAUSCHER: No. We can talk.

3 MR. BALABANIAN: We will email it to your Honor.

4 THE COURT: Get it to me today because most of  
5 tomorrow I'm not going to be here.

6 MR. BALABANIAN: Thank you for taking the time.

7 Thank you, your Honor.

8 (Which were all the proceedings had in the above-entitled  
9 cause on the day and date aforesaid.)

10 I certify that the foregoing is a correct transcript from  
11 the record of proceedings in the above-entitled matter.

12 \_\_\_\_\_  
Carolyn R. Cox  
13 Official Court Reporter  
Northern District of Illinois

\_\_\_\_\_  
Date

14 /s/Carolyn R. Cox, CSR, RPR, CRR, FCRR  
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